

CIVIL PROCEDURE I Law A 502 C

SYLLABUS

Fall Quarter 2018
Professor Schnapper

Texts

Friedenthal, et al., Civil Procedure (12th ed.) [CP]
Supplemental Course Materials [SCM]
2018-19 Civil Procedure Supplement (2018 Supp.)

There are a large number of civil procedure treatises and study guides, many available in the University Bookstore. These books cover most but not all of the same material we will cover in class. Some but not all students find these helpful. (Some are available in the library if you want to look them over). I do not have a favorite among them. If something in one of these volumes seems inconsistent with what we have said in class, let me know; sometimes these books are using technical terms in a slightly different way.

The syllabus generally reflects the order in which we will be taking up each of these topics. Some topics take less than one class period, and some take a bit more. If you miss a class and want to be sure what we will be doing in the next class, you should check with one of your colleagues (or with me).

Questions in class are very helpful (of course, I get to ask questions too), and we all benefit from them. It may at times happen, regrettably, that more questions will arise in class than there is time to answer. If that occurs, you should persist in seeking an answer after class.

I will generally be available after class to answer questions, although we may have to continue our discussions out in the hall or in the lounge area if our room is needed for some other class or meeting. I am in my office (room 413) most of the day, and usually can talk with students while there, other than in the hour before our class. If I am on the phone, come in anyway and I will let you know when I expect to be free.

I also welcome questions by e-mail. (schnapp@u.washington.edu).

If need be you can reach me by phone (616-3167). In the days immediately before an exam you can call me on my cell with questions ((206) 660-8845). My assistant is Ellen Monteith; her office is in room 328. Her number is 685-6950.

You will see later in the syllabus two writing assignments. They are both short and will be ungraded. Don't obsess about them.

Please let me know when you have a paper due. I know from past experience that you are less likely to be as well prepared the day before or after handing in a paper, and I like to be able to take that into account when planning a class.

Learning Objectives: By the end of this course, you should

- Be familiar with the basic concepts of civil procedure, such as in personam jurisdiction, subject matter jurisdiction, service, notice, venue, removal, and standing
- Be able to understand the procedural context in which civil cases read in other classes (such as contracts or tort) arose, and how that context may have shaped the litigation and the outcome of the case
- Understand how attorneys use civil procedure rules and standards to attempt to achieve a favorable outcome for their clients, including (for defendants) avoiding a decision on the merits at all

(1) Introduction to Civil Procedure
CP: 6-16

I don't expect you to understand at once all the terms and concepts in these pages, but they will give you a good idea of what the course is about.

After class go to the library main reading room and page through a volume in one of these multi-volume sets.

Moore's Federal Practice Ref. KF 8820 A313
Wright, Federal Practice and Procedure Ref. KF8840 W68

I. Prerequisites for a Civil Action

(2) Service of Process: Generally

(a) Summons and Complaint

Federal Rules ("F.R.C.P.") Rule 4(a)-(c) and (e)
(Supplement)
(Abrogated) Forms 1, 3 and 11(a), (after Rule 86)

CP 227-30(biography of Harry Grossman; "place and leave with" service). The federal service language is "deliver personally."

Should this service on poor Mrs. Schnible be upheld?

Is it legal to lie and scare Mrs. Schnible half to death?

What if she ran out the door in panic, tripped and hurt herself—could she sue Harry?

What if Mr. Grossman, when Mrs. Schnible would not open the door, warned "I'll be back" (deep voice, Austrian accent) and drove a Hummer through her front window, and handed her the summons and complaint?

What if Harry threatened to drown her cat Mittens if she would not come out, and she came out and was handed the summons, complaint, and poor frightened Mittens?

What if Harry just slips the summons and complaint under the door and Mrs. Schnible happens to be home?

What if he knocks and says "I have a summons and complaint," and Mrs. Schnible says "slip them under the door"?

What if Harry leaves the summons and complaint with a neighbor and tells Mrs. Schnible it is there?

What if the papers fall out of Harry's pocket when he is walking in the stairwell, and Mrs. Schible catches them?

What if Harry hires a telemarketer to read the papers to Mrs. Schnible over the phone?

What if Harry scans the papers and e-mails them to Mrs. Schible as a pdf attachment?

What if Harry throws the summons and complaint into her mailbox, just as she reaches in and picks up the contents?

What paradigm did the legislature have in mind when it used the phrase "place and leave with"?

What if Harry pushes the summons and complaint under the door, and Mrs. Schnible is home?

(b) Under the Federal Rules, what is the difference between a summons and a complaint?

What does the summons (under the Federal Rules) tell the defendant about the plaintiff's beef?

What does the complaint tell the defendant about what he or she has to do?

Could this stuff be in a single document?

Who signs the complaint?

Who signs the summons?

So long as the defendant gets a copy of the complaint and summons, why do we care how that happened?

(c) Should Washington allow

--service by mail

--service by email

(so long as the defendant actually gets the papers)

(d) CP 216-18 (history of Rule 4)

(e) Rule 4 (d)

Forms now at the end of Rule 4

How does Rule 4(d) work? If the plaintiff decides to do this, what goes in the envelope?

Which party benefits from a Rule 4(d) waiver? See Rule 12(a)(1)(A)(i)

Are there any circumstances in which the defendant is better off not waiving?

Are there any circumstances in which a plaintiff should not sue a waiver?

Look over Rule 4(d) and consider the following questions. What happens under Rule 4(d) if the defendant does not waive and--

(i) the required information and material is mailed but the Post Office loses the envelope?

(ii) the plaintiff gives the envelope to a stranger on the street, who in fact delivers it to the defendant? What if, unknown to the plaintiff, the stranger is an off-duty and very honest postman?

(iii) the defendant has moved, and the materials are forwarded from Paris, Texas to the defendant in Paris, France?

(iv) the complaint and other required information are sent by fax or e-mail and actually received?

(v) 10 days after sending the waiver material, the plaintiff hires Harry Grossman (who serves the defendant) and then seeks reimbursement for the cost of Harry's services?

(vi) What if the notice says the defendant gets 30 days, but the defendant's lawyer calls the plaintiff's lawyer who agrees to 45 days?

(vii) What if the waiver is mailed back on day 40, Harry is hired on day 35 and serves on day 41?

Look at Rule 4(e). How many different ways are there to execute service on an individual in a federal case?

Is service by mail OK?

If the summons and complaint were handed to the defendant, are there any circumstances Under Rule 4 in which that would not be valid service?

(3) Service of Process: Service on Whom?

Think of service, not as a thing, but as a bundle of rules about delivering legal papers to the defendant.

Even though a process server personally hands the summons and complaint to the defendant and announces "there, you have been served!", and the defendant says "yep, you finally served me", that still might not be service under the Federal Rules. Look at Rule 4(c)(2). What a lawyer means by "service" is not what a non-lawyer means when using that word.

- (a) Service on person at the defendant's usual place of abode
Rule 4(e), 4(h)
CP 230

In the National Development case, did the court decide this correctly?

Is the apartment Khashoggi's dwelling place or his usual place of abode or both?

Would the service be valid if Mr. Khashoggi had not been staying in his apartment on the day the papers were delivered?

Would the service have been valid if the housekeeper spoke no English, and had no idea what to do with the documents and threw them away?

What is the standard in this case?

Do you think the default judgment was fair?

Suppose Mr. Khashoggi loses most of his fortune and now has only the one apartment in NY; is delivering the papers to the defendant's housekeeper OK?

Suppose a process server with papers for The Situation leaves them with Snooki at the house they are both renting for the summer on the Jersey shore. Is that valid under Rule 4(e)(2)(B)? [Is this question dated?]

Suppose a process server with papers for Eloise leaves them with the Manager at the Plaza Hotel, where Eloise lives with her mother and her dog Weenie.

What if Bob and Pat were on their honeymoon at a hotel in New York, and the summons and complaint for Bob were handed to Pat, who then gave them to Bob? Is that service valid?

What if they were on their honeymoon at Bob's time-share condo in Aspen, and the same thing occurred?

Does everyone have a usual place of abode?

Does everyone have a dwelling?

Are "dwelling" and "usual place of abode" the same?

(b) Service on authorized agent

CP 231-35 (National Equipment Rental)

What happened here?

Why does it matter if service is valid?

Who is right, the majority, Black, or Brennan?

On what ground do the dissenters disagree with the majority?

What is the legal question that determines whether the service was valid? What is the exact question here? Is the answer governed by federal or state law? If state law, which state? How would we determine what state law provides?

What if the Szukent's had only signed the contract because the representative of NER threatened to steal their cow Bessie?

Under the majority opinion, what result if (a) Ms. Weinberg forgot to forward the summons and complaint to the defendants? (b) She mailed the summons and complaint to them, but the post office lost it? (c) She had moved to and was served in Miami, and the Szuhkents lived at the time of the lawsuit in Seattle? (d) She is a paid employee of the defendants?

What if Michigan passed a law providing that contracts appointing out-of-state agents for service of process were invalid? Can Michigan do that if a case is brought in New York or federal court?

What if Lord Grantham foolishly appoints his evil valet Thomas his agent for service of process; Thomas gets the summons and complaint but throws them out and never tells the boss?

(c) (Insurance Co. of North America)

CP 227-29; look at Rule 4(h)

Is this case correctly decided?

What is the rule here?

Is the rule based on

--state agency law
--federal agency law
--an interpretation of Rule 4?

What result if this had been the claims adjuster's first day? If the complaint had been served on the claims manager's secretary?

Suppose the summons and complaint were handed to a well-dressed man at the desk with a sign reading "serve legal papers here," but the man turned out to be the janitor getting ready to go out on a big date?

If you were the district judge, would you exercise your discretion to rescind the default judgment?

What if service had been on a woman dressed in overalls and moping the floor, who unbeknownst to the process server was the CEO getting ready for an episode of Undercover Boss?

If you were counsel for a potential defendant in the Second Circuit, what advice would you give your client to avoid this problem?

If you were counsel for a plaintiff in the Second Circuit, what would you instruct your process server in light of this case?

If you want to serve in the Second Circuit a big firm, such as Goldman Sachs, how would you do that?

(4) Service of Process: Immunity from Service

- (a) Immunity from service
CP 244-48(State ex rel. Sivnksty)

Make a note of any terms in this opinion whose meaning is unfamiliar, and go look them up.

Who is Duffield?

What is the rule in this case?

Why wasn't Svinksty protected from service?

Is this the right result?

What if the defendant had posted bond and been released, and thereafter been served?

What if the bond required the defendant to stay in the state?

What result if Sivnksty had been extradited from New York?

What if the police had lured him from New York with false news he had won the West Virginia lottery, and then arrested him?

What would have happened if Svinksty was a billionaire?

Suppose, suit is brought in federal court located in West Virginia, and the defendant had been released on bail, went home to New York, and was served when he came back for a hearing in the criminal case. Would the service be valid?

How did the plaintiff's attorney manage to serve the defendant in jail?

What would be the outcome if an arrest warrant was issued in Spokane, and the person for whom the warrant was issued voluntarily drove to Spokane from Boise, and was served at the police station?

- (b) Service by trick

CP 244-50 (Wyman)

The reasoning of this case is somewhat opaque. We will treat it as a case holding that the service on Edgar was invalid.

What advice did Edgar's lawyer give Edgar?

Why is this case in New York?

Why is it in federal court?

Why should a federal court care about what some judge in Florida did in a case that never got litigated there anyway?

Why does it matter if service was valid? Why did Sarah lure Edgar to Florida?

What if Florida just authorized a process server to serve a defendant when he was in another state—e.g., serve Mr. Newhouse in New York?

Which jurisdiction's legal standards should control whether this service was valid—Florida law, New York law, or federal law?

Edgar could have complained to a Florida judge about the way he got served. Why are we letting him bypass the Florida courts and raise this in some other court?

What if Edgar went to the Florida court, unsuccessfully argued that service was invalid, and then refused to take part in any further litigation there when he lost?

What is the rule in this case? Is it a good rule?

What could Wyman do to lure Newhouse to Florida?

Would the service be valid if Sara moved to Seattle, wrote to Edgar that she was depressed because of all the rain, and induced him to visit by falsely promising to take him to dinner at Ivars and go bar hopping in Pioneer Square?

Does this decision apply to Harry Grossman shouting "fire" to lure a defendant out of her apartment to serve her?

What if Mrs. Schnibble moved to Miami, and Harry lured her out of her apartment by proclaiming, "Mrs. Schnibble, I have always loved you"?

What would be the result if Mrs. Wyman had merely lured the defendant to New Jersey?

Suppose, after this decision in the Second Circuit, Wyman brings a suit in Florida state court to enforce the Florida judgment she won earlier? Can she do that?

What if Newhouse was served the same way, but the original case was filed in federal court in Florida; would the service be valid?

(5) **Notice**

CP 211-18(Mullane)

What is the difference between service and the constitutional requirement of notice?

Think of "notice" in this case, not as a thing or particular type of action, but as a bundle of rules. Constitutional notice is not the same thing as "notice" in ordinary English. What is the difference?

Was there service in Mullane? Is it possible to have service without notice?

Is it possible to have notice without service?

Since the constitution already requires "notice", what is the point of having a separate set of rules about something called service?

Would there be notice if the summons and complaint were placed in a bottle and thrown off the Fremont Bridge, and the next day the bottle washed ashore and the defendant found the bottle and examined the contents?

Mullane

What is this case about? Who is Mullane? Why did he or she enter a special appearance?

Watch out for new legal terms here; look up what you need to

Why is this a federal issue at all--this was a suit in state court.

What is the property in dispute?

What does Mullane claim the bank did wrong in managing the money? (trick question)

What is the problem here? Mullane knows about the suit and she is in court?

What are the standards in Mullane for the type of notice usually required to meet the constitutional standard?

Why didn't the Court require the usual in person service?

Some people are not constitutionally entitled to service of that sort.
Who?

When is service by publication OK under Mullane?

What if the complaint and summons are sent by first class mail, which the applicable service rule allows, but the Post Office loses them. Has Mullane been violated?

What if one of the trust beneficiaries had actually read the notice in the newspapers?

What would a plaintiff seeking to sue the head of ISIS have to do to satisfy Mullane?

What information must the notice contain to be constitutionally sufficient?

Is it possible to have "constitutional notice" without having "ordinary English notice"? Is it possible to have "ordinary English notice" and still not have "constitutional notice"?

Jones v. Flowers CP 222-24

Is service by certified mail constitutional?

What would you do if you really wanted to reach Jones?

How if at all does the Jones decision affect the constitutional standard?

The Supreme Court says the plaintiff need not look up the defendant's address in the phone book. Do you agree?

Cases in notes CP 219-25--why was, or wasn't, the notice sufficient in each?

Is Wuchter good law?

In Mabee what should the plaintiff have done?

Is attaching the summons and complaint to the defendant's door constitutional or not? See Greene.

Was Dusenbery correctly decided?

When the estate of a decedent is closed out by court order, the claims of any remaining creditors are usually barred, assuming there was due process. Whom does an executor of an estate have to notify for all remaining claims to be barred in this way?

(6) In personam jurisdiction: early cases
CP 77-88 (Pennoyer)

This unit begins a series of cases that will fashion a complex body of constitutional law. In a number of respects the legal standards first announced in Pennoyer will later change.

To understand who is who here, read the note at the end before you read the decision in Pennoyer. There were actually two lawsuits.

Who were the parties in each and what was the issue in each?

- (1) Was there service? Notice?
- (2) List all the reasons for the decision. Each one is (or could become) the basis for a rule for other cases. What rule would follow from each of the reasons in the opinion. Evaluate whether you think each such rule does or does not make sense.
- (3) Would the result in Pennoyer be different if Neff
 - (a) actually was handed the summons and complaint while in Seattle?
 - (b) actually saw the notice in the newspaper?
 - (c) was at all times in Vancouver WA, but had a friend in the court clerk's office in Portland who each night rowed across the Columbia river and told Neff what was going on?
 - (d) was in Ashland, Oregon when the notice was published but knew nothing about the notice?
 - (e) was in the court in disguise when the judgment was entered?
 - (f) moved back to Oregon and registered to vote there after the entry of the original judgment?
 - (g) before the suit was filed, became an Oregon resident but then left to pan for gold in the Yukon and has not returned?
- (4) How could Mitchell collect his money if Neff stays out of Oregon?
- (5) Mitchell won a judgment for \$300 in Mitchell v, Neff. Could he go to California and enforce that judgment? What about

full faith and credit? Could Mitchell use that judgment to seize a Neff bank account in Oregon?

(6) There are three kinds of actions with distinct jurisdictional rules: in personam, in rem, and quasi in rem. Which are involved in this case?

(7) Why doesn't this case succeed as a quasi in rem action?

Did Neff have any connection to Oregon before the suit started? Does that matter?

(8) Suppose Congress adopted a statute under which any American who was injured by a terrorist attack abroad could sue the terrorist in the US. Would such a lawsuit be constitutional with regard to a terrorist who was not served in the US?

(9) Can Neff litigate in this case whether the original service in Mitchell v. Neff was defective? Do you agree with the Court's decision about that? Why does the Court think service was OK in Mitchell v. Neff? Is the Court's decision in this regard consistent with Mullane?

(7) In personam jurisdiction: emergence of new principles
CP 88-99 (Hess; International Shoe)

What occurred in Hess?

How did the statute work in Hess?

Under the Pennoyer standard who would have won in Hess?

What is the rule in Hess?

Hess

In Hess would the result be the same if--

(a) the defendant proves he did not know about the law for appointment of the registrar as agent for service of process?

(b) and also proves he would never have driven in Massachusetts if he had known?

(c) the defendant proves he did not know he was in, or intend to visit, Massachusetts, but got lost while driving on a misty night in Rhode Island?

- (d) the waiver covered any debts the driver owed to anyone in Massachusetts?
- (e) if the state required, as a condition of use of its highways, that the motorist waive in writing his or her right to jury trial in any criminal case arising out of a car accident?

How sound is the reasoning in Hess? Do you think this is a fair result?

Could a state law provide that anyone who does any business in the state is deemed to have appointed the Registrar as agent for service of process for litigation related to that business?

International Shoe

In what court was this lawsuit filed? (trick question)

Under the Pennoyer standard, who would have won International Shoe?

Under the Hess standard, who would have won International Shoe?

What occurred in International Shoe? Go through the opinion for new phrases and words.

How can International Shoe Co. be sued in Washington when its headquarters is in St. Louis?

Under International Shoe--

- (a) what are the factors and standards to be used in deciding if the exercise of jurisdiction is constitutional?
- (b) would the result be the same if the defendant were not a corporation but a natural person, Waldo Shoemaker? Where is International Shoe? Where is Waldo?
- (c) under the International Shoe standard who would have won Pennoyer v. Neff if the earlier suit in Mitchell v. Neff had been against Neff, Inc. rather than Mr. Neff? Why did it matter in International Shoe that the defendant was a corporation not a person?
- (d) what would be the result if Air New Zealand bought one 747, negotiated by phone from Auckland, signed the deal by mail with Everett plant officials, but then refused to pay?
- (e) what if the contacts ended before the summons and complaint were served?

- (f) exactly what are the Washington state benefits that International Shoe enjoyed?
- (g) what if the lawsuit was filed in Washington by an Idaho leather merchant which had sold leather to International Shoe, but never been paid?
- (h) could a consumer in Washington sue over defective shoes?
- (i) suppose a salesman who worked for International Shoe was served while he was in New York City visiting Mrs. Schnible--would New York have jurisdiction over the company? Suppose the CEO of International Shoe was served while she was in California at the Video Music Awards?

(8) In personam jurisdiction: specific jurisdiction

CP 99-104. 112-24(Hanson; McGee; World Wide Volkswagen)

(Long arm statutes)

McGee

This is an appeal from the second lawsuit; where was the first lawsuit and what is the difference between the two suits?

In McGee, who made the decision to make this a multi-state deal?

Who would have won McGee under International Shoe? What is new here?

Could International Life Ins. sue Franklin in Texas for non-payment of premiums?

What if McGee had bought one pair of shoes by mail from International Shoe, which had no other sales in California--could the company be sued if the shoes were defective?

What could International Life have done to avoid being sued in California?

What if Franklin (the insured) after taking out the policy had moved to Maine, died there, and the beneficiary sued in Maine?

Under McGee, what would happen if the plaintiff called a hotel in Hawai'i and made a reservation, which the hotel confirmed in a letter or e-mail to Seattle. Could the hotel be sued in Seattle?

What if an out-of-state insurance company (with no other business connection to Washington) insured Jo-Lo's bottom at Bumbershoot (she really insured it once), and she was injured here during the concert?

Hanson

If Dora had stayed in Pennsylvania, would the bank have been subject to jurisdiction there?

Is this decision consistent with McGee?

Whose decision created the situation in which the bank was administering (or was to administer) a trust for someone in Florida?

What if Dora had been living in Florida when she set up this arrangement with the bank?

What if after she set up the trust, Dora moved to Florida and from there opened a checking account with the bank?

Under Hanson, would the result be different if the claim was that the bank had stolen money from the trust?

Are McGee and Hanson consistent? What legal standard would you propose to explain whether a case was covered by McGee or by Hanson?

World-Wide Volkswagen

Be sure to figure out who is who in World Wide Volkswagen.

This is a car crash like Hess. Why is the result different?

Not all the defendants objected to in personam jurisdiction. Which did not and why do you think they did not?

Under the standard in World-Wide Volkswagen--

- (a) what if the Robinsons had told the dealer (Seaway) they were going to drive to Oklahoma?
- (b) what if the crash was in New Jersey? What if the Robinson's lived in Jersey, and they told the car salesman that?

What if the car had been leased from World Wide Volkswagen?

- (c) what if Seaway had been in Portland, OR, the crash was in Vancouver, WA, and Seaway knew the Robinsons lived in Vancouver, WA?
- (d) what if the plaintiff proved that 20 World Wide Volkswagen Audis a year were driven through Oklahoma? What if it was 200? 2000?
- (e) would the result be different if WWV's headquarters were just across the state line in Texas?
- (f) what if all the WWV officers happen to live in Oklahoma and often worked from home?
- (g) what if WWV sold one car, via the internet, to Bubba in Oklahoma, the brakes failed and Bubba crashed into Tammy. Could Bubba sue WWV in Oklahoma? Could Tammy? Could the Robinson's sue if it turned out their car crashed for the same reason?
- (h) what if the WWV corporate headquarters were in Oklahoma?
- (i) what if Seaway stored its parts in Oklahoma?

What is the general standard in World-Wide Volkswagen? List all of the factors in the Court's opinion, and sort out how those factors are used.

(9) In personam jurisdiction: specific jurisdiction (continued)

CP 122-31 (Keeton; Kulko: Burger King)

CP 157-59 Bristol-Myers Squibb

Rule 4(k)(1)

Keeton

This case is in federal, not state court. So what is the problem?

Ms. Keeton had no deliberate relate contacts with New Hampshire. Why is this OK?

Why didn't these contacts suffice?

--he was sending support to his wife in California

--he bought a ticket for his daughter to go to California

--he was in touch with his kids in California

In Keeton, what new issue did the Court have to decide?

The defendant in Kulko had lots of contacts with his wife and kids in California. Why wasn't that enough? Would the result be different if the defendant

--had sent abusive letters to the kids while they were in California?

--had failed to make agreed upon child support payments?

Did Rudy do business in Florida?

What is new in Burger King?

Under Burger King--

(a) why is all of this an issue since the case was filed in federal court?

(b) how is it possible for Rudy to be sued if he has never been in Florida?

What if Rudy had dealt only with Burger King officials in Michigan, the contract contained no reference to Florida, and no one ever told Rudy the Burger King headquarters was in Florida?

(c) What if anything is new in the legal standard here?

(d) What could Rudy have done to keep from being sued in Florida?

(e) Under the Burger King standard who would win Pennoyer?

(f) Suppose you order a new Ford, to be built to your specifications (color, extras, etc.) in Detroit. You place the order with the dealer in WA. Could you be sued in Michigan by Ford if you refuse to accept delivery? If the car were a lemon, could you sue Ford in Washington?

(g) Your American Express card is issued by a firm in NYC. You deal with American Express by phone and mail, and have used your card on vacation in NYC. The fine print in your annual agreement says disputes are governed by NY law. Can you be sued in NYC if you don't pay your bill?

(h) You agreed in an e-Bay auction to sell your widget to someone who turned out to be in the American Virgin Islands. She decides the widget is defective, and sues you in the a V.I.

small claims court. Can she do that? What if you have a summer house in the Virgin Islands?

- (i) Think back to the Szukhent case. If there had not been a designation of a local agent to receive service, could National Equipment Rental have sued the Szukhent's in New York?
- (j) How could Rudy have avoided having to defend this lawsuit in Florida? What could Burger King have done to prevent Rudy from doing that?

Do you think this case should be tried in Florida?

Bristol-Myers Squibb

Which part of specific jurisdiction law is this about—minimum contacts, convenience factors, or relatedness?

Suppose one of the out of state plaintiffs could show that she bought her pills from a pharmacy that had obtained them under a contract with McKesson, the national distributor located in California. Would that alter the outcome?

- (10) **Specific Jurisdiction: stream of commerce**
CP 105-12, 132-56 (Gray, Asahi, McIntyre)

What is the theory of the Illinois Supreme Court in Gray?

Is this consistent with prevailing standards regarding specific jurisdiction?

How would this case come out under the Burger King minimum contacts standard?

Asahi is a 4-4-3 decision! How is that possible? To figure out the standard it announces, you have to figure out what rule gets a total of 5 votes. So what is the standard here anyway?

What does Asahi tell us about the relationship between minimum contacts and the 5 convenience factors?

What would be the result under Asahi if:

- (a) the outside-the-US defendant made only one small car part a week, but it was designed for the California market?

(b) the outside-the-US defendant made lots of a particular car part, but it was not designed for the US market in particular?

(c) Zurcher is still the plaintiff and he now seeks relief from Asahi?

Think back to Gray, which also involved an allegedly defective valve. Is Gray good law? What would be the result in Gray if a court applied the standards in Asahi?

McIntyre

How is this stream of commerce case different from Gray and Asahi?

What is the

- Kennedy standard
- Breyer standard
- Ginsberg standard?

Which opinion states the rule?

What standard do you think the Court (Breyer?) should adopt?

Should Congress allow this case to be brought in federal court? Could it do so constitutionally?

What result if the distributor sold 10 machines a year in NJ, and each one costs \$1 million? If you were Breyer, what standard would you adopt?

Would it matter if McIntyre retained title to the machines until they reached the ultimate purchaser—i.e., they were sold on consignment?

Is there a state in which there would have been jurisdiction?

Should Rule 4(k) be amended to cover a case like this?

(11) General jurisdiction: presence and consent

CP 195-205, 159-68(Burnham, Goodyear); DaimlerChrysler AG v. Bauman

Why does it matter whether jurisdiction is specific or general?

Goodyear

Why isn't there specific jurisdiction?

What if the tires involved in the accident in France had originally been sold to a bus manufacturer in North Carolina, who then shipped them to France?

Why not general jurisdiction?

Why didn't Goodyear-US contest jurisdiction?

What were the factors militating for and against general jurisdiction in Goodyear? Why did the Court hold there was no general jurisdiction?

Would the result be different in Goodyear if the president of the European corporate defendants had been served while he was in North Carolina?

In a case like Goodyear, how should the doctrine of in personam jurisdiction be applied to related corporations? If a state had jurisdiction over Goodyear USA, would that allow it to exercise jurisdiction over the Goodyear Europe subsidiary? Is this a question of federal constitutional law, or state corporations law?

DaimlerChrysler AG v. Bauman

Why didn't the plaintiff assert specific in personam jurisdiction?

What is the new standard for general jurisdiction over a corporation?

Under the standard in each opinion, where would there be general jurisdiction?

In what states would there be general jurisdiction over Mercedes Benz USA?

Since Mercedes Benz USA obviously does lots of business in California, why isn't that enough to reach its parent Daimler?

In Goodyear, would there have been general jurisdiction in North Carolina over Goodyear USA?

There are several different opinions in Burnham. To what degree do the standards proposed in each differ? Which do you think is the right standard?

Under Burnham would the result be different if

--Burnham were served while flying in California airspace from NY to Hawaii?

--If Burnham was a tourist from Kenya changing planes at the LA airport?

--If Burnham wandered into California while hiking in Nevada?

--If Burnham had been arrested in NYC, extradited to California, and was served while in custody?

Did Burnham have minimum contacts in California?

Should Washington immunize from service out-of-state parents who are visiting their children here?

Could Carnival Cruise Lines sue the Shutes in Florida? (See 195-96)

Would the contract be valid if it required the Shutes to sue Carnival Cruise Lines in Panama?

Can CCL sue the Schutes in Florida?

If not, where can CCL sue the Schutes?

Did CCL have minimum contacts with Washington?

(12) Electronic Contacts and Intentional Interstate Torts

CP Look at Calder on p. 123; Walden v. Fiore CP 156-7, and the section on electronic contacts, 173-79

The defendants in Calder were a writer and editor, not their employer, the National Enquirer. Inquiring minds want to know, how can this meet the minimum contacts standard? Does this case meet the Burger King or International Shoe standards? Why doesn't the Court rely on the number of newspapers sold in California?

What if Ms. Calder, unbeknownst to the defendants, had moved to New York and was now trying to have a career there. Could she still sue in California? Could she sue in New York?

Why did Fiore lose?

What if a scam artist in Georgia emailed Fiore, said he was a Nigerian prince who had won the lottery but needed \$1,000 to collect his winnings, and promised Fiore if he would help; Fiore is duped and sends the bad guy \$100. Can Fiore sue where he lives and got the email?

What if someone in Atlanta invites Fiore to a polker game there; Fiore accepts and gets cheated at the game. Can Fiore sue where he lives and got the email?

Which of the many standards for electronic contacts is the correct one?

In Keeton v. Hustler (which we read earlier, CP 122), what if Hustler Magazine only published on line?

What is new in Walden v. Fiore?

What if Walden knew that Fiore was in Nevada and wanted to harm him?

What if that is so and Walden just hates people in Nevada?

What if Walden wanted to harm Fiore in Nevada, because he knew Fiore needed the money to pay a gambling debt there, or he would be roughed up by an enforcer?

Most of what we have learned about jurisdiction over persons and things is summarized in a chart at the end of the syllabus.

(13) In Rem and Quasi-in-rem Jurisdiction Over Property

What are the differences among in rem, quasi-in-rem, and in personam jurisdiction?

CP 179-94(Shaffer)

What happened here?

Pennoyer said the judgment wasn't there there would have been good if Neff's land had been attached before the suit began. Is that good law after Shaffer?

Why wasn't the regular in personam specific jurisdiction standard met in Shaffer?

Could the Shutes (if there were not forum selection provision) bring a quasi in rem action in Washington against Carnival Cruise Lines by attaching one of the Lines' ships while in port in Seattle? What if the ship they seized was the Tropicale?

In Walden, what if one of the defendant police officers owned a condo in Las Vegas; could he then have been sued in Vegas?

Why does the existence of quasi in rem actions matter in the wake of Shaffer? See Rule 4(n).

If a couple was married and lived in WA, and a spouse then walks out and moves to NYC, would the NY courts have jurisdiction to resolve a divorce action?

In light of Shaffer, how can an in rem suit be brought that binds people who have never been in the state? Why is this different from quasi in rem?

If Delaware can overturn the result in Shaffer just by passing a new law, what was the point of this decision?

(14) Halloween Review Class

We will hold this class on Wednesday, October 31. This is a mid-term review class.

Dr. Faust has entered into a contract with The Devil to trade his soul for worldly riches. You represent Dr. Faust and believe the contract is invalid. You want to bring an action against The Devil to have the contract declared null and void.

--If you are suing in federal court (see Rule 4(f)), how would you serve the defendant?

--How could you use Rule 4(d)?

--Would it be sufficient to hand the summons and complaint to someone who was possessed?

- Your client proposes to give the devil his due if the devil will meet him in front of the Goldman Sachs headquarters. If the devil shows up and service is made, would it be valid?
- What type of action is this--in personam, in rem, or quasi in rem?
- If you can't serve the devil personally, what would be enough under Mullane?
- Would there be specific jurisdiction in Washington? General jurisdiction? Could you establish presence?
- Would there be diversity jurisdiction? (Take a look at section 1331(a))
- Where would there be venue?

COSTUME IMMUNITY!!!

Any student who attends this class in costume will enjoy immunity from being called on, unless the student chooses to raise his or her hand. In the event of a dispute as to whether what a student is wearing qualifies as a costume, the issue will be decided by a vote of the class.

Research: You may, if you dare, read United States ex rel. Mayo v. Satan, 54 F.R.D. 282 (W.D.Pa. 1971)

(15) Subject Matter Jurisdiction: Diversity

Exactly what is subject matter jurisdiction and why does it matter? (You undoubtedly recall that Elle Woods invoked subject matter jurisdiction (incorrectly, but who cares) to retrieve her manicurist's dog).

28 U.S.C. §§1332(a)-(c), 1332(e), 1359 (These are in the Supplement)

(Don't read 1332(d))

Often important questions about the meaning of statutes cannot be answered by looking at the text; in other instances the question and the text must be read very, very carefully.

For this class you need not (indeed, I don't want you to) read any cases. Instead, review the text of 28 U.S.C. sections 1332 and 1359.

Would be diversity jurisdiction in the following situations? In analyzing each problem, consider separately the following factors: (a) text of the statute, (b) purpose of the statute, (c) what possible alternative interpretations there could be, (d) what incentives would each alternative interpretation create for litigants, (e) ease of judicial administration, and (f) what additional facts, if any, might matter. Also, think about what the paradigm situation the framers had in mind when they wrote the text.

- (1) A (citizen of California), B (citizen of Washington) and C (citizen of Oregon) sue D (citizen of New York), E (citizen of New Jersey) and F (citizen of Oregon) in a single lawsuit. (Assume that jurisdictional amount is satisfied).
- (2) A and B, then citizens of California, have a car accident with C, a citizen of California. Before filing suit, A becomes a citizen of Washington. After filing suit but before trial, B becomes a citizen of Oregon. (Assume that jurisdictional amount is satisfied).
- (3) A, an American citizen born, raised and living in Paris, France, sues B, a citizen of Washington. (Assume that jurisdictional amount is satisfied).
- (4) A, a citizen of Guam, sues B, a citizen of the U.S. Virgin Islands, and alleges damages of \$75,000.00.
- (5) A (a citizen of Washington), assigns his \$100,000 contract claim to B (a citizen of Oregon), who then sues C (a citizen of Washington).
- (6) Where diversity exists, A sues B for an injunction regarding B's building, which encroaches on A's land. The value of A's land is diminished by \$5,000, but it will cost \$100,000 to move the building. Does section 1332(b) shed any light on this?
- (7) Where diversity exists, A brings an action against B over 3 unrelated claims - tort, contract, and libel - each for \$50,000.
- (8) Where diversity exists, A and her family, B and C, are hit by drunk driver D. A, B and C bring a single suit against D, each seeking \$50,000 in damages.
- (9) B, a Delaware corporation headquartered in Portland, violates its contract with A, an Delaware corporation headquartered in Seattle. Before suing, A reincorporates in Washington, and rescinds its Delaware incorporation.

(16) Subject Matter Jurisdiction: Diversity

CP 280-96 (Mas, AFA Tours, Hertz Corp., Huilin International, Freeland)

This covers half a dozen cases on recurring issues in diversity law. We will briefly discuss the holding and wisdom of each.

If time allows, we will spend some time on the question of whether there would be diversity jurisdiction at all and whether it should be more (or less) limited. Would Mas be decided the same way today? What is the claim in AFA Tours that meets the jurisdictional amount?

Mas v. Perry

When in the proceedings did the defendant move to dismiss for lack of diversity jurisdiction? Could the defendant have challenged service then?

In Mas, what result if Mrs. Mas testifies that she hates living in Mississippi and is never going back?

What if at trial Mrs. Mas admits that she now intends to live in Louisiana?

Suppose Perry had sued Mr. and Mrs. Mas in federal court. What could Mrs. Mas or Mr. Mas have said to defeat federal jurisdiction.

What if Jean Paul Mas always intended to stay in or come back to Louisiana?

What if Jean Paul was an American citizen and a resident of Louisiana when he married Mrs. Mas. Could Mrs. Mas still bring this suit by herself?

What if Judy and Jean Paul break up. Can she sue him in federal court for divorce? For looting her checking account? For not paying agreed upon alimony?

AFA Tours

Do you think the plaintiff is going to win over \$50,000?

What if, after discovery, the defendant argues that the plaintiff simply does not have either (a) evidence of wanton conduct

sufficient to get punitive damages or (b) sufficient evidence to show damages of \$50,000?

How would you assess the value of an injunction to stop the defendant from giving the names of former clients to other tour companies?

What was the basis of the original motion to dismiss? What occurred in the district court to that issue?

What if Rush Limbaugh (of Florida) sues Jon Stewart (of New York and formerly of the Daily Show), alleging that Jon is beaming death rays at Rush that are causing him constant excruciating pain and \$1 million in damages. Would there be federal jurisdiction?

How does section 1331(b) work and what is its purpose

Hertz Corp.

Who is claiming that Hertz is a citizen of California? What were the possible alternative interpretations here? How did the Court arrive at the interpretation in this case?

(17) A private cause of action

SCM: Bivens

To understand what this case is all about, think of as many methods as you can by which we might enforce a rule forbidding the federal officials from engaging in "unreasonable searches and seizures" -- we will make a list in class. Which of these enforcement mechanisms is best?

(1) What are the differences among these possible laws? Which creates a private cause of action?"

"DEA agents shall not conduct searches without warrants."

"The federal district courts shall have jurisdiction over lawsuit which alleges that DEA agents conducted unlawful searches."

"In lawsuits against DEA agents, the plaintiff can be awarded damages."

"If a DEA agent is sued in tort because of a search, the fact that the agent was conducting that search to detect a possible violation of federal law shall constitute a defense if, but only if, the agent had a warrant"

"People whose persons or property has been searched by DEA agents without warrants can bring lawsuits."

What was the government's argument in this case, and why didn't it work?

Look with care at the footnote to Justice Black's opinion. This statute, now 42 U.S.C. § 1983, is unusual, an express free-standing private cause of action.

(2) If the defendants won in the Supreme Court, what could the plaintiff do? How will the U.S. respond? So what was the point of all this? Look at footnotes 5 and 7.

(3) What is the Court's argument? Is it persuasive? What standard does it formulate for other cases?

(4) If Mr. Bivens has a private cause of action, does that mean that he can sue in federal court?

(5) What if the suit were in a state that had a state private cause of action to enforce the Fourth Amendment?

(6) What if the suit alleged that the plaintiff had not been promoted to a better job at DEA because he was Swedish?

(7) What if the suit was against the President for authorizing the FBI to conduct warrantless searches for terrorists who had landed by submarine?

The phrase "cause of action" has two meanings, one of which is sometimes phrased as "private cause of action."

(18) A Private Cause of Action

SCM: Cort v. Ash

This case touches on a number of procedural issues other than private cause of action:

Types of injunctive relief

Retroactivity

The meaning of legislative intent

The different types of legislative history materials

Ash originally had three different counts in his complaint. What were they, what were the differences, and what happened to each?

What is the enforcement mechanism expressly established by the original statute? What is the additional enforcement mechanism at issue here?

What relief was plaintiff denied in the 1972 proceeding?

This case arose in 1972. Why does the 1974 statute matter?

What is the Cort standard? How does the legal standard used here differ from the standard in Bivens? Do you think it was correctly applied in this case?

This is a lawsuit about contributions to a presidential campaign that allegedly violated Federal law. How can that be traditionally a matter of state regulation?

Would the result be different if the suit were brought by Senator McGovern, the Democratic nominee in 1972?

Would the result be different if Ash sued as a voter?

Could Delaware create a cause of action that allowed stockholders to bring suits to enforce the federal laws against corporate contributions?

(19) A Private Cause of Action

SCM: Thompson v. Thompson

What happened here?

What is the rule in section 1738A and why was it adopted

Is the order of the Louisiana court valid under the PKPA?

What enforcement mechanism is provided to Mr. Thompson by the PKPA? Is it express?

Why does the majority think there is no private cause of action here?

How, if at all, has the standard changed? Was it correctly applied here? What part of the statute involved mattered and why? How would each of the Cort factors apply in this case?

Do you really think Congress intended that a parent like Mr. Thompson would not have a cause of action to enforce the PKPA?

Suppose Mr. Thompson raises the PKPA in the Louisiana courts, but those courts ignore the PKPA and award custody to Mrs. Thompson. What can Mr. Thompson do?

Do you think Justice Scalia has a better approach? Exactly how does the Scalia standard differ from the majority opinion?

Justice Scalia thinks the courts should generally ignore legislative history. Is he right?

Given this interpretation of the PKPA, are there any circumstances in which Mr. Thompson would obtain any legal advantage by kidnapping his son? Could the former Mrs. Thompson obtain any legal advantage by kidnapping her son back?

(20) Subject Matter Jurisdiction: Federal Question

CP 298-304 (Osborn; Mottley); 351-52(Bright)
28 U.S.C. §1331 and 1257
Go look at Article III of the Constitution

The mere fact that some party may raise some issue of federal law is not enough to allow the plaintiff to bring that case in federal court. Indeed there may be some instances in which Congress can't authorize the litigation of such cases in federal court (other than the Supreme Court).

Osborn

In reading Osborn, it will help to know that the Bank of the United States was a federally chartered private bank. In that era Congress had not yet enacted a general federal question jurisdiction statute like section 1331.

What is the legal issue actually in dispute in Osborn?

If the Bank of the United States sued a carpenter who built a defective desk, what federal question jurisdiction would exist?

Could Congress give the federal district court jurisdiction over any capital punishment case in which the defendant raised a federal constitutional issue? Conversely, could Congress adopt a statute providing that the federal courts shall not have jurisdiction over any case challenging the constitutionality of a death sentence imposed on a state defendant?

Mottley

What are the merits of this suit going to turn on?

Who challenged the existence of subject matter jurisdiction?

The Mottley suit is about federal law, so why isn't there federal question jurisdiction?

What body of law gave Motley the private cause of action to enforce the promise of a pass?

Would there be jurisdiction under section 1331 if the RR sued Motley for a declaration that the promise to provide and honor a pass was unlawful and unenforceable under federal law?

Would there be jurisdiction under section 1331 if the Motleys sued the United States for a declaration that the 1906 law was unconstitutional?

Could Congress authorize Mottley to sue in federal court? To remove to federal court after the answer was filed? Would it be a good idea?

Could Congress authorize removal to federal court of any state prosecution in which a federal constitutional question arose?

Does Mottley overrule Osborn?

What is the difference between the question before the Court in Osborn and the question in Mottley?

What are the standards in Osborn and Mottley? Are they consistent? Does it make any sense that if they are different? What result under Osborn if the Bank of the US (in Osborn) had sued Ohio officials in tort?

If the Mottleys now sue in state court and lose (the law is held constitutional), how can the Supreme Court then hear the case on appeal?

On the facts of Osborn, would there be federal question jurisdiction under section 1331 in light of Mottley?

Was there federal question jurisdiction in Cort v. Ash? Thompson v. Thompson?

Bright

How can Bright be correct? Didn't Mr. Bright do exactly what the Supreme Court told the Mottleys they were supposed to do?

(21) Subject Matter Jurisdiction: Federal Question
CP 304-22(Harms; Merrell Dow, Grable, Gunn)

Harms

How did this dispute arise? Who is getting the royalties now?

Did the complaint in this case meet the Mottley well pleaded complaint rule? Why was there no jurisdiction? What is new in the legal standard here? Could this claim exist if there were no federal copyright act?

Does Congress have the constitutional power under Osborn to amend section 1331 to create federal jurisdiction in this case?

Would there be jurisdiction if Eliscu sued Harms alleging that Harms was selling sheet music and failing to pay Eliscu royalties?

The court says that a case arises under the law that creates the "cause of action." Which of the meanings of "cause of action" is the court using?

Would there be jurisdiction if Harms sued Eliscu to invalidate his copyright on the ground that Eliscu had stolen the lyrics from Harms?

Would there have been federal question jurisdiction if Eliscu had brought his original action in federal court?

Merrell Dow

Who is asserting that there is federal jurisdiction in this case?
Who is denying it?

Does this meet the Mottley standard? The Harms standard? So what's the problem?

What are the roles of federal and state law in the plaintiffs' claim?

What is the problem as far as the majority is concerned?

Is Merrell Dow consistent with Harms?

Would the result be the same if the Food Drug and Cosmetic Act had a private cause of action, the federal statute of limitations had run, but the state cause of action had a longer period of limitations?

Why did the defendant in this case remove to federal court only to assert forum non conveniens? If it didn't want to be in federal court at all, why not just remain in state court?

Why did the plaintiff sue in Ohio court, rather than in the court of some other state.

If the plaintiff wins in state court on count IV, will the Supreme Court have federal question jurisdiction to review that?

Why is there federal question jurisdiction in Grable? What does Grable say about the meaning of Merrell Dow?

Gunn

Why isn't there federal question jurisdiction in this case?

Smith, Moore, Shoshone

Are these decisions consistent?

Are they good law after Merrell Dow?

Quick Review

In each of these three statutes, where (if at all) is (1) jurisdiction, (2) a remedy, (3) a private cause of action, and (4) a command or rule?

"Federal Lady Gaga CD Price Control Act"

"(1) No person shall charge more than \$20 for a Lady Gaga CD.

(2) Any person who pays more than the amount in section (1) may maintain a civil action against the seller.

(3) In any action under section (2), the court shall award as damages three times the amount by which the price paid exceeded the amount permitted by section (1).

(4) The district court for the Western District of Washington shall have exclusive jurisdiction over any action under this Act."

"Federal Lady Antebellum CD Price Control Act"

"It shall be a crime, punishable by a fine of up to \$10,000 or two years in jail, to sell a Lady Antebellum CD for more than \$3.99."

"Family and Medical Leave Act"
(This is the real statute)

FMLA section 103: "An eligible employee shall be entitled to a total of 12 workweeks of leave during any 12-month period . . . because of the birth of a son or daughter"

FMLA section 105: "It shall be unlawful for any employer to interfere with, restrain or deny the exercise of . . . any right provided under this subchapter."

FMLA section 107(a)(1): "Any employer who violates section 105 shall be liable to any eligible employee affected--for damages equal to the amount of any wages . . . lost to such employee by reason of the violation."

FMLA section 107(a)(2): "An action to recover the damages . . . prescribed in paragraph (1) may be maintained against any employer . . . in any Federal or State court of competent jurisdiction by any one or more employees."

(22) Supplemental Jurisdiction

CP 322-29 (UMW v. Gibbs)

Subject matter jurisdiction is jurisdiction over a claim. There has to be a jurisdictional basis over each claim.

How can there be federal jurisdiction over a state law claim between non-diverse parties?

What we now call supplemental jurisdiction (since 1991) used to be called pendant and ancillary jurisdiction.

Gibbs sets out the general standard for when a state law claim can be included in a federal question based lawsuit in federal court. (Don't worry about the older standard in Hurn.)

--what is the standard in Gibbs?

--if you had been the district judge in Gibbs, would you have thrown out the state law claim once the federal claim had been thrown out? Suppose the district judge in Gibbs had dismissed the state law claim once the federal claim was thrown out; would the Supreme Court have affirmed or reversed that decision?

--suppose the federal claim had been dismissed just before the trial. Should the judge then throw out the state claim too?

--suppose Mr. Gibbs alleged that the Union had not paid rent it owed him for a union office they had rented in a building he owned? what if he alleged the union's motive in withholding the rent was to retaliate against him for his ties to Consolidated Coal?

--under Gibbs, should a federal court decline to exercise jurisdiction over a state law claim because deciding that claim would take an extra week of trial?

Other possible cases:

(1) A WTO demonstrator sues a cop in federal court, alleging a violation of her free speech rights occurred when the cop hit her for carrying an anti-WTO sign. Can she also include a state law claim of assault and battery? Would there be a common nucleus of operative fact? What if she claims that the same cop, after arresting her, pinched her bottom. Assuming that that is a state law tort, can she include that claim in her federal action?

(2) Federal judges in Los Angeles once routinely dismissed state law tort claims included with federal question claims of unconstitutional police brutality. Is that subject to challenge?

(3) Billy Joel contends that Queen Latifa broke into his office and stole some copyrighted lyrics, which she then used in a song. They agree to discuss the matter over tea at the Four Seasons. A scuffle breaks out, and Queen Latifa allegedly decked Billy. Billy brings an action against Queen Latifa for copyright infringement. Can he include (a) a claim for trespass in his office, or (b) a claim for his physical injuries?

(4) In Bivens, could Mr. Bivens include in his federal lawsuit a state court claim against the DEA agents for trespass and false arrest? Could Bivens sue the federal agents in federal court for the constitutional violation, and then later sue them in state court for trespass and false arrest?

(23) Supplemental Jurisdiction

CP 328-48 (Owen, Exxon), Executive Software
Artis (Supp. At 387)
28 U.S.C. §1367

Look at Owen. Was there jurisdiction over the claims between the defendants? Over the claim of the plaintiff against the second defendant? Is this a good rule? Could Congress constitutionally create federal jurisdiction in this situation?

What question was decided in Finley?

Read section 1367 carefully. Look up each Rule referred to under in subsection (b). What is new here? What is section 1367(d) about?

Is Owen good law under section 1367?

Is Finley good law under section 1367?

Section 1367(d) suspends the statute of limitations in state court for a state cause of action. Why did congress do that? How could Congress possibly have the authority to do such a thing? What about federalism?

Is Exxon right? Under which Rule were the additional plaintiffs added in Exxon? In Ortega? But the House did not mean to overrule Zahn? What result if a plaintiff files a cross-complaint against a third party defendant that is diverse, but does not allege jurisdictional amount?

What did the district court do wrong in Executive Software? If the exercise of supplemental jurisdiction is discretionary, how can the court of appeals reverse? What should the District Court do on remand?

How if at all do the factors in section 1367(c) differ from Gibbs?

(24) Removal

CP 349-54 (Dart Cherokee)
28 U.S.C. §§1441, 1446-7

(Ignore section 1441(c) (d) and (e))

Be prepared to explain the mechanics and timing of removal and remand.

--What does a defendant do to remove?

--How soon does the defendant have to do that?

--What can a plaintiff do if he or she objects to removal?

--who decides whether a particular case is removable?

In Shamrock, if the plaintiff abandoned his or her original claim, would removal then be possible?

Can a plaintiff defeat removal by showing the defendant wants to remove because it does not like the state judge, and is just forum shopping?

Suppose a plaintiff sues in state court, alleging both a federal and a related state claim. After the defendant removes the case, the plaintiff drops her federal claim and moves to remand the case to state court. What should the judge do? (This is Carnegie-Mellon)

Should a third party defendant be permitted to remove a case?

What happens if a state court complaint has a federal claim and an unrelated state claim. Can the defendant remove? If yes, what happens in federal court?

What if the plaintiff asks for only exactly \$75,000 in damages?

If a plaintiff sues several defendants, all defendants must either remove or consent to removal. Does consent require that the other defendants file a timely written statement of consent, or is it sufficient that counsel for the party that does remove includes in its papers a statement that the other defendants consented?

Take a look at the chart on p. 4 at the end of the syllabus.

What is Dart Cherokee all about

(25) Venue

CP 370-84(Bates; Hoffman); 396-402(Atlantic Marine)
28 U.S.C. §§ 1391(a) to (e), 1392, 1404, 1406

In how many different places might there be venue in a federal question case?

Is it possible that there could be a case based on federal question jurisdiction regarding which no court had venue?

Assuming that the action was in federal court, where would there be venue in each of these cases? Under which provision?

- (1) D1 resides in Vancouver, WA. D2 resides in Portland, Oregon. Car crash was in Vancouver, BC.
- (2) D1 resides in Spokane. D2 resides in Ballard. The car crash was in Afghanistan.
- (3) The car crash was in Victoria, B.C. At the time of the crash, D1 and D2 both lived in Seattle. Before the suit was commenced, D2 moved to Boise.
- (4) D1 resides in Seattle. D2, an alien, resides in Portland. Plaintiff resides in Idaho. The defendants allegedly shot the plaintiff's wife in Utah.
- (5) Same as in #4, but the defendants are both FBI agents who reside in Seattle, and were engaged in a raid.

Suppose Maureen Dowd (whom we will assume lives in Washington, D.C.) writes a column in the New York Times (which is headquartered in New York and mostly printed in New Jersey, but also printed in smaller amounts in a number of other states) asserting that former Vice President Cheney (who lives in Wyoming, but read the story while on vacation in Miami) is a "war profiteer", and he wants to sue her for libel. Where would there be venue?

In Bates, why is there venue regarding a defendant which did not engage in any deliberate contact with New York? Would there have been venue in any other districts? What if Bates took the letter to Alaska and opened it there? What result if the defendant had written

"Do Not Forward" on the letter, but it was forwarded? Did the defendant have some other way to defeat this suit in NY federal court?

If you were the district judge in Bates, would you grant a change of venue?

In Hoffman, who is Hoffman? Why wasn't there in personam jurisdiction in N.D. Ill.? What result if prior to the action being brought the defendant in writing waived any objection to venue in Illinois?

Can a court have venue and yet service would be barred by the territorial limits of service Rule?

Is it possible that the territorial limits of service Rule would be met and yet there would not be venue?

Atlantic Marine—How do forum selection clauses affect venue?

Does the district court have to grant a change of venue if the location of the suit violates the forum selection clause?

Should the district court dismiss the case if it violates the forum selection clause?

Why didn't the Supreme Court just say the District Court should enforce the forum selection clause by granting the change of venue?

What if the forum selection clause said that all suits had to be brought in Paris (France, not Texas)?

(26) Forum non conveniens

CP 384-96 (Piper Aircraft)
28 U.S.C. §1404

The Gulf Oil case was an FNC doctrine for claims that belonged in another federal district court that was used before Congress adopted the change of venue provision.

Figure out what happened in Piper. (It was pending at various times in three different trial courts)

Why did Reyno want to sue in California?

Was there venue in Pennsylvania?

What is likely to happen to this case once it is refiled in Scotland?
Does that matter?

What are the rules and factors in Piper.

What if when the US suit was filed the statute of limitations had run out in the UK?

What if the UK lacks in personam jurisdiction over Hartzell?

Does it matter that Reyno is a US citizen?

If you had been the district judge before whom the FNC motion was filed, would you have granted it? If the judge had denied the motion to dismiss on FNC, should the court of appeals have reversed?

If you represented the plaintiffs and wanted to reduce the risk of dismissal under FNC, what could you do?

What could the defendants have done to influence the outcome in this case?

What should the district court have done in this case if a plaintiff were from the US?

If you represented Air Navigation and McDonald, would you want the Reyno case to be dismissed on FNC? If not, what could you do to try to influence the outcome?

Would service be OK under Rule 4(k) in the W.D.Pa.?

What is the difference between venue and FNC?

Think back to Merrell Dow. If there had been federal jurisdiction in that case, would it be dismissed under FNC?

Look at the list on p. 19 at the end of the syllabus

(27) Exhaustion

SCM: Weinberg v. Salfi
McCarthy v. Madigan

There are several kinds of exhaustion rules. The plaintiff must
--initiate some sort of administrative action and wait until it is
over (possibly a judicially created exception if it is just taking
inexcusably long)
--initiate and wait a minimum number of days
--initiate and wait at least a minimum number of days, or until it
is over if it occur sooner, or if you want to wait and it is
longer

Some exhaustion rules are created by statutes, others are created
by courts.

In Weinberger, -

(a) Why can't this suit asserting a violation of a federal constitutional
right be brought under Bivens?

If section 405(h) did not exist, would the courts let the plaintiff
bring a Bivens action to get Social Security benefits?

Does this suit arise under the constitution or under the Social Security
Act?

(b) What if a plaintiff like Salfi just sued and alleged that exhaustion
would be futile?

(c) What is the point of making a Social Security claimants exhaust?
What is the point of making claimants like Salfi exhaust?

(d) Exactly why isn't Salfi required to exhaust here? Or did she
exhaust? Could the Supreme Court decide this case if the
Secretary did object and argue a lack of exhaustion? Could
Salfi have sued as soon as her claim was rejected in the
district office of the SSA?

(e) So why can't the class action proceed?

(f) If there were not statutory exhaustion requirement in Salfi,
would the courts impose one?

(g) Suppose Salfi just sued under section 1331, and the defendant
didn't object to that until the case reached the Supreme
Court?

An employee cannot file an employment discrimination lawsuit under
Title VII unless he or she has first filed a charge with
EEOC and waited 180 days. If, after an employee has filed
such a charge, the employer discriminates again, should
the employee have to file a second charge?

What factors do courts use in deciding whether to require exhaustion?

Why wasn't exhaustion required in McCarthy?

Look at the material on p. 18 at the end of the syllabus.

Why do we (sometimes) have a judicially created exhaustion requirement?

In McCarthy, would exhaustion be required if the plaintiff also wanted an injunction to require the defendants to give him better medical care? Would exhaustion be required if the administrative process were modified to authorize monetary awards?

What could the Attorney General alter the administrative process so that inmates would have to exhaust in this situation?

(28) Statutes of Limitations and Laches

SCM: O'Brien v. Eli Lilly
NAACP v. NAACP LDF

Basic issues about any statute of limitations dispute:

How long a period is the limitations period?

When does it usually start to run? (e.g., when did the violation occur?)

What could delay the starting of the time period? (e.g., equitable tolling?)

What could stop the clock? (e.g., plaintiff in military deployed abroad)

What has to be done by the deadline? (file complaint? Serve the defendant?)

In O'Brien--

(a) if you were casting the deciding vote in this case, how would you rule and why?

(b) the Supreme Court has not yet decided whether there should be a discovery rule applicable to federal statutes of limitations? How should that issue be resolved? What arguments would you make in support of whichever side you favor? If you favor such a rule, what would be the contours of the rule?

In NAACP--

- (a) The LDF knew all along that the NAACP was not happy. Why does laches apply?
- (b) Suppose the NAACP brings a new suit this year and proves that today the NAACP is losing money because people who want to donate to the NAACP are giving to LDF by mistake. Can they get an injunction? Could they get the money mistakenly given to LDF because the donor thought it was the NAACP?
- (c) If the NAACP did not want to sue in 1965, what should it have done to preserve its rights?
- (d) When did laches attach? What is the laches standard?
- (e) how is laches different from a statute of limitations?
- (f) suppose in 1965 LDF setup a scheme to skim \$1 million a year from the NAACP bank account? Would laches bar that suit today?

(29) The Plaintiff Must Have "Standing"

SCM: Warth v. Seldin

Not everyone who is unhappy about a violation of federal law is allowed to bring a lawsuit.

What are all the rules in this opinion about who can and cannot sue? Why are they different types of rules?

Article III

What standard has to be met to have Article III standing?

Can Article III standing be waived?

Who has Article III standing to sue for money?

Who would have Article III standing to challenge a Washington statute that permitted Catholics to drink at 21, but required Protestants to wait until they are 22?

Could Congress adopt a law that gave someone standing, e.g., permitting the AG to file suit to get a judicial opinion about whether a statute was constitutional or what it meant?

Who would have standing to sue to challenge a law giving a church \$ 1 million to say prayers for Trump's soul?

Prudential Standing

What is the prudential standing rule?

Who has prudential standing to sue for money?

Claims in Warth

Go over each claim and claimant. Why did each fail?

- Rochester taxpayers
- Metro Act
- Low income individuals
- Home Builders Association
- Housing Council

Given the rules, did the Court get the right result in this case?

Go through each of the different plaintiffs to see if he or she indeed lacked standing, and if so what kind. Look at footnotes 14-16. (Sometimes footnotes just list cases, e.g. n.17; in other instances the footnotes are where the case really gets decided.)

If you wanted to try to bring this lawsuit again, what types of plaintiffs would you look for?

Other issues

Assume Kermit and Ms. Piggie are still going out, and are employees of the Muppets. If Ms. Piggie complains that (in violation of Title VII) she is being paid less because she is a female, and the Muppets retaliate by firing Kermit, can anyone sue?

Who would have standing to challenge a zoning rule in Medina requiring that every house be at least 1000 square feet?

Could Congress enact a law authorizing any poor person within 50 miles of Penfield to sue to challenge its zoning rules?

When does an organization have standing to sue?

If a prosecutor with an invidious racial motive use peremptory challenges to exclude all blacks from a jury, who has standing to object?

Mootness

Think of mootness as a situation in which the plaintiff had Article II standing at one point, but does not have it any more? (e.g., a 25 year old Protestant in the hypo above)

In PICS v. Seattle an organization sued the city of Seattle because of its race-based student assignment plan. The organization sued on behalf of members whose kids were in the public schools and affected by the plan. By the time the case got to the Supreme Court, all those kids had graduated. At that moment, did PICS still have standing? What should PICS do to keep the case alive?

Suppose the UW law school had an affirmative action admissions plan, and someone wanted to challenge it. Which of these would have standing:

A rejected white applicant now at UCLA?

A 3L who got into the UW on a preliminary injunction?

A rejected applicant who had a C GPA and did not get in anywhere?

You will discuss standing again, in a more theoretical vein, in Constitutional Law. We want to focus in our class on standing as a problem to be solved by plaintiffs or exploited by defendants.

(30) How to Litigate Standing Issues

SCM: Los Angeles v. Lyons; Lujan

Constitutional scholars debate the proper contours of standing, but from a litigant's perspective it is increasingly a (sort of) factual issue to be proved. Lyons and Lujan give us important guidance about how to litigate these issues. We will also want to discuss whether the cases are rightly decided; Lyons is obviously related to the Rodney King case. If you think either case was incorrectly resolved, is that because the Court got the standard wrong or because it erroneously evaluated the facts? If the standard, what rule would you apply?

Lyons

Does Lyons have standing to bring this lawsuit? (trick question)

- (1) Warth said that the plaintiffs there had failed to (plausibly) allege injury caused by the alleged violation. Lyons obviously was injured. So what is the problem?

- (2) Why isn't this case moot? Which side maintains that the request for injunctive relief should be decided on the merits? Why?
- (3) Did Mr. Lyons ever have standing to seek injunctive relief?
- (4) What would Mr. Lyons have to show to have standing?
- (5) Who could sue for an injunction if Lyons could not. Could a single plaintiff litigate all the relevant issues? See n. 7.

Who would have standing if the police had a practice of beating up one randomly chosen person every night?

Would Lyons have standing to bring this suit in state court?

Could a taxpayer sue to enjoin the choke hold because it is costing the city a lot of money that raises taxes?

In the recent challenge to the Obama immigration policy, the Fifth Circuit held that Texas had standing to challenge the policy because the folks getting permission to stay in the US would then apply for drivers licenses, which in Texas are subsidized by the state—to the Obama policy, if valid, would cost Texas money. Can Texas get a nationwide injunction against enforcement of that policy?

Lujan

- (1) Why did the Court hold there was no standing?
- (2) Suppose the Crocodile Lady filed an affidavit asserting that she was going to Egypt next year? What if the Leopard Lady alleged that she went to Sri Lanka every year? What if she said she wanted to take her daughter, now age 3, to go for her 18th birthday to see the leopards?
- (3) If you represented the Defenders of Wildlife and had this to do over, what could you go to solve any of the problems which the Court saw with standing here? Who would have standing to bring this action?

What if the Defenders of Wildlife complaint asserted "Every year at least one Defenders of Wildlife member goes to see the crocodiles in Egypt and the leopards in Sri Lanka."?

- (4) What if the complaint alleged "The plaintiffs have standing and will be injured if the injunction is not granted"?
- (5) Part III-B, which has only 4 votes, gives two additional reasons for denying standing. Are they sound?

What does Lujan tell us about how to litigate standing?

Look again at footnote 16 in Warth.

(31) Provisional remedies and the opportunity to be heard

CP 250-67(Fuentes; Connecticut v. Doebr)

What is the problem underlying these cases?

In each case, what is the standard for when a provisional remedy can be awarded? As with in personam jurisdiction, this evolves a bit.

Who owned the property in Fuentes?

What was wrong with the process in Fuentes?

What result if in cases like Fuentes the contract provides that the buyer waives his or her due process rights and agrees to seizure without notice or hearing? (Think about Szhukent).

What if in Fuentes the plaintiff had merely attached the stove, but had not physically removed it?

Under Doebr, was there a deprivation of property at all?

What factors weigh for and against the validity of a pre-hearing seizure?

What if in Doebr the claim was for an unpaid credit card bill, and copies of those bills was attached to the pleadings?

Many states of laws creating workmen's liens--someone who works on a house can get an automatic lien on that house if he or she claims he or she was not paid. Is that constitutional?

If you were drafting a statute authorizing pre-notice seizure of property, how would you frame it?

In several of these cases, after some provisional remedy was ordered in the state court, the defendant--rather than objecting in the state proceeding--went to federal court instead. Was that proper?

Do you agree with the Second Circuit decision in Shaumyan?

During this class or the next we will discuss briefly the paper that will be due for unit 35.

See p. 11 at the end of the syllabus

(32) The Erie Doctrine

CP 404-21(Erie; Guaranty Trust)

Look at the Rules of Decision Act. What part of this statute is Erie interpreting?

To start with, what is the question at issue in Erie? What part of Swift v. Tyson got overruled?

What are the various rationales for the holding in Erie? What general rule or standard would follow from each of those rationales?

If the standard applied by the federal court is different than the standard applied by the state court, would that difference favor the plaintiff or the defendant? Which one would want to be in federal court? Think about removal law.

Don't try to understand what the merits issue was in Guaranty Trust, just focus on the differences between state and federal law.

How would Guaranty Trust be decided under the original Erie analysis?

What are the standards in Guaranty Trust Co.?

Could Congress constitutionally establish a federal statute of limitations for the commencement of such actions in federal court?

Would the validity of such a law depend on whether the federal period was shorter or longer than the state law period?

Under Guaranty Trust Co., as to which of the following must a federal court use the state standard--

--deadline for notice of appeal?

--standard for punitive damages?

--availability of pre-judgment interest?

--whether contributory negligence is a bar or just reduces the amount the plaintiff can win?

(33) The Erie Doctrine

CP 424-47 (Byrd; Hanna; Walker).

See the chart on handwritten p. 13

In all of these cases

If the difference in the federal and state rule outcome determinative?

Could it lead to forum shopping?

Does federal jurisdiction give an advantage to out of state plaintiffs?

What is new in Byrd? Under Byrd, what result if

--South Carolina, but not federal practice, permits a jury of 7 and majority rule?

--South Carolina recognizes a defense only if both a judge and jury agree the plaintiff was not a "statutory employee"?

In Herron (see p. 412) state law provided even greater protection of the right to jury trial than did the federal constitution.

Why should a federal court resist applying such a state law in a federal proceeding?

Given the text of the RODA, how can Hanna be right?

In Hanna, if there was no provision in the FRCP about service, and the matter was at the discretion of the Federal Marshall who served everything, what result? Isn't this outcome determinative?

How does the decision in Hanna alter the standard in Guaranty? Could the issue in Hanna lead to forum shopping? Is it outcome determinative?

Could the Rule in Sibbach v. Wilson lead to forum shopping?

Why didn't the Rule control in Walker?

What if under Oklahoma law state judges had discretion to extend the limitations period beyond the 60 days?

What if state law barred from bringing suit in the state courts any corporation that was not registered to do business in the state.

Would a federal court apply that prohibition in a federal proceeding?

(34) The Erie Doctrine

CP 447-75(Stewart Organization; Gasperini; Shady Grove)

Stewart

What was the plaintiff's position about the significance of the forum selection clause? What was the defendant's position?

What if the defendant just moved to dismiss on the ground that the plaintiff agreed not to sue in Alabama at all?

Does the contract require the court to grant a change in venue? Does it require the plaintiff not to oppose such a change?

Why does section 1404 matter at all?

Why does the contract matter?

What if there was a claim that the contractual provision regarding forum selection was forged?

Does Alabama law forbid a change in venue?

Under the contract could the court dismiss the case for lack of venue?

What should the district judge do on remand?

Could applying section 1404 as the Court did lead to forum shopping?

Think back to Atlantic Marine

Gasperini

Why doesn't federal practice control everything? Ok, so why doesn't state law control everything?

Would continued use of the federal "shock the conscience" standard lead to forum shopping?

The basic rules in this area of the law are summarized in a flow chart at the end of the syllabus.

Shady Grove

Which doctrine is being applied here?

Could this lead to forum shopping?

Wasn't the purpose of the NY law to limit how much a defendant would have to pay? Why doesn't Gasperini apply?

See the chart on p. 13.

NOTE: The writing assignment for unit 35 will be due at this class

II. Delineating the Issues: Pleading and the Civil Rules

Some of the basic goals of the Federal Rules, and the methods by which they are achieved, are summarized in a list at the end of the syllabus.

(35) The Complaint: How to Write One

CP 564-68 (Dioguardi)

Rules: 7(a), 8(a), 8(d), 8(e) and 12(b)

Why do we care how specific or clear the complaint is? Can't we just figure all of this out later?

If you represented the United States on remand in Dioguardi, how would you answer the complaint set out in the book?

Writing Assignment

Following the decision in Dioguardi, your law firm agreed to represent the plaintiff on remand. The partner at your law firm instructed you to draft an amended complaint for Mr. Dioguardi, and provided you with a copy of the decision and with the other materials about the case found in the casebook.

Draft a new amended complaint for Mr. Dioguardi. If you think that there is anything else you need to know in order to finish the complaint, (1) do the best you can without that information, and (2) attach a memorandum for the partner explaining what else you want to know and why.

You may do this project by yourself or jointly with one or more other students. If you write the complaint with others, just list everyone involved on the cover.

By the due date get your paper to my assistant, Lauren Anderson, at leal010@uw.edu.

This paper is not graded.

(36) Twombly and Iqbal

CP: 568-600(Swierkiewicz, Twombly, Iqbal)

Look at (abrogated) Form 11

What was the issue in Swierkiewicz?

In Twombly

- what was the plaintiff's claim
- did the defendant know enough to be able to answer
- what else is the court requiring
- Do you think that standard was met?

--Does Form 11 satisfy Twombly?

In Iqbal

--the complaint alleged the defendant was motivated by religious animus. Why wasn't that enough?

--do you think it met the Twombly Iqbal legal standard?

--do you think religion was a motivating factor in the AG's action?

Could you simply allege "The plaintiffs were mistreated by the federal defendants because of his religion"?

Which of these allegations would be sufficient under Iqbal and Twombly?

"The defendant employer fired the plaintiff on account of the plaintiff's race"

"The defendant employer fired the plaintiff because the plaintiff is African-American"

"The defendant employer fired the plaintiff on July 1, 2013 at 11:00 a.m. because the plaintiff is African-American"

"The defendant employer fired the plaintiff because the plaintiff is African-American. The supervisor who fired the plaintiff is a racist"

"The defendant employer fired the plaintiff because the plaintiff is African-American. The supervisor who fired the plaintiff belongs to an all-white country club"

"The defendant employer fired the plaintiff because the plaintiff is African-American. The supervisor who fired the plaintiff belongs to the Ku Klux Klan"

"The defendant employer fired the plaintiff because the plaintiff is African-American. The boss said the plaintiff was being fired because he had sexually harassed Ms. Smith. But the plaintiff never harassed her or anyone else"

(37) The Complaint: Special Pleading Requirements

Johnson 2015 Supp. 374
CP 599, 603-17(Johnson, Kearns, Tellabs; Ziervogel)
Rules: 9, 54(c)

What did the plaintiff in Johnson fail to plead? Why didn't it matter?

Which of these allegations would be sufficiently specific?

- (a) the car dealer defrauded the car buyer.
- (b) the car sale was fraudulent; the car was a lemon.
- (c) the car sale was fraudulent; the dealer falsely represented that the car was in mint condition.
- (d) the car sale was fraudulent; the dealer falsely represented that the motor was in good shape.
- (e) the car sale was fraudulent; the dealer falsely represented that there was adequate cylinder pressure

What is the issue in Tellabs? When you read Twombly, consider what Tellabs suggests about the applicable standard.

Is Ziervogel correct? What is the point of Rule 9(g)? Would the result be the same in federal court?

(38) Testing The Complaint Under Rule 12

CP 618-33(notes, Garcia, Swanson)
Rules: 12(a), 12(b), 12(c), 12(h)

Suppose in Dioguardi the government had moved to dismiss on the ground that the complaint failed to allege the plaintiff had exhausted his administrative remedies. What should the court do?

What did the defendant's motion in Garcia accomplish? What if anything could the plaintiff have done better?

Why did the defendant file a motion for a more definite statement in this case?

Was the court correct in granting that motion?

(39) Answer; Reply; Supplemental Pleadings; Amendments

CP 623-52(Moore, Beeck; Krupski)

Rules: 7(a), 15

Answer

Rules 8(b), (d), 12(a), 12(h)

(Ingraham)

Beeck

How would you have exercised your discretion if you had been the trial judge?

Did the plaintiff do the right thing in continuing to argue that Aquaslide really made the slide once this problem arose? What other option did the plaintiff have?

Moore

Go through each of the post-trial amendments. If you were the trial judge, would you have granted those motions, or denied them, or granted them but given the plaintiff more time to respond?

If you had been the plaintiff's attorney and noticed that evidence was being offered that did not seem relevant to the plaintiff's claims, would you have:

--objected

--asked for a continuance on the ground it raised a new issue

--shut up and feigned surprise later on

--shut up, and ask for more time when the defendant (or court) announced she wanted additional relief?

Krupski

Since the motion to amend was granted, what is the issue?

Does it matter if a plaintiff should have known that a party not named as a defendant was liable?

Does it matter if a plaintiff waits a long time before moving to amend?

What if within the statute of limitations period the plaintiff alleges that she was fired for one unlawful reason (e.g., race), and

after the limitations period has expired seeks to amend to add a second unlawful reason (e.g., gender)?

Does it matter if the defendant waited until the statute of limitations had run before disclosing the error?

Worthington (p.652)

What would be the right answer here?

(40) Counterclaims

RCP 679-88(Heyward-Robinson)
Rule: 13

Which party wants counterclaims to be mandatory?

In Heyward-Robinson the court gives a number of different reasons for permitting the counter claim; which are sound?

What is the connection between the Navy job and the Stelma claim that makes the Stelma counter-claim OK?

Under Heyward-Robinson, could D'Agostino have joined the claim about the Stelma job to its original complaint?

(41) Rule 11 and the duty of truthfulness

Rule 11
CP 653-69(Surowitz, Hedges)

How does Rule 11 work? Is it too weak to deter attorneys from filing pleadings which they know are baseless, or from doing so without making a real investigation into the facts?

In Hedges, why did the plaintiff and his attorney get away with having made inaccurate statements of fact?

What if Kunstler did not believe what Hedges told him?

Suppose the lawyer believes an allegation of the complaint when it is filed, but discovery shows the lawyer was wrong. What does Rule 11 require?

Suppose you represented Mel Gibson who is the defendant in a federal diversity case arising out of an automobile accident. The complaint alleges that Mel was drunk at the time of the accident. Mel denies it, but his girlfriend--who was in the car at the time--tells you Mel was drunk.

- (a) Would you sign an Answer denying the allegation that Mel was drunk?
- (b) Suppose during discovery the plaintiff produces a police report saying Mel failed a breathalyzer test. Would you have an obligation under Rule 11 to change the Answer?
- (c) Suppose when Mel is questioned under oath at a deposition, he states that he really cannot recall what happened the night of the crash. Would you have an obligation under Rule 11 to change the Answer?
- (d) If you represented the plaintiff in (b) or (c), would you attempt to invoke Rule 11?

III. Discovery

(42) Scope of Discovery: limits on burdensome discovery

RCP 851-62(Fassett, Marrese)
Rule: 26(b)(1) and (2)

How did Marrese get to the court of appeals?

In Marrese the court of appeals asserted that the interests of the defendant could have been protected, without denying the plaintiff needed information, through either redaction or in camera review.

--Why should there be a protective order at all? If so, which if these would be best:

--court to examine all the documents in camera, and turn over only what is relevant and non-privileged

--documents given to plaintiff but with names redacted?

--documents given to plaintiff's attorney, who cannot disclose to his client any of the names?

--Was the court correct in barring access to the list of opponents for the purpose of deposing them about their reasons?

--Was the court correct in saying that if the in camera examination found nothing inculpatory in the files of the plaintiffs that should end this line of discovery?

Consider the infamous Monica Lewinsky case. President Clinton was being sued for allegedly having sexually harassed Paula Jones. The plaintiff's attorney sought permission to ask Clinton at a deposition about whether he had had sexual relations with any other employee. Should the judge have allowed any such questions? Why were they relevant? Why did Jones' attorney ask such questions? Should the judge have limited the discovery (e.g. to questions about prior complaints of harassment) or allowed broader discovery (had Clinton ever kissed an employee?)

In a car crash case, could the plaintiff ask

- (a) the defendant's wife if the defendant was a bad driver?
- (b) the defendant for a list of every passenger who had been in his care for the previous two years?
- (c) the defendant's neighbor about whether there were rumors that the defendant was a drunk driver?
- (d) for copies of all checks for the last 5 years, to look for body shop repairs to the defendant's car?

Suppose a woman who was denied tenure alleged that that denial was the result of gender discrimination. Her lawyer has asked for a copy of the tape recording that was (perhaps foolishly) made of the faculty debate and vote. What sort of protective order, if any, should the court issue?

How would you rule on the discovery disputes in the cases on pp. 849-50? Was the requested discovery material? Was it burdensome?

(43) Information exempt from discovery

RCP 891-912(Hickman; Upjohn)

Rule: 26(b)(3) and (5)

NOTICE: The writing assignment for unit 44 is due at this class

Hickman

Under Rule 26(b)(3) could the plaintiff ask for a list of all known witnesses?

Could plaintiff ask the name of any person who saw the captain drinking?

Could the plaintiff serve an interrogatory asking if anyone saw the captain drinking that day, forcing the defendant to reveal that one employee told the lawyer he or she had seen that?

What if the attorney had asked each witness to write out his or her story? Would those documents be discoverable?

Can one attorney ask a witness what the witness said to opposing counsel?

What if the defense attorney had asked the witnesses to go over the attorney's notes and correct any mistakes or omissions?

If the defense attorney interviewed two witnesses at once, could the plaintiff ask each witness what the other one said?

If the defendant's public relations manager had asked the defense attorneys what the witnesses had said, could the plaintiff depose the public relations manager?

Could the plaintiff write out everything the witnesses had told her, and then ask the defendant if the same witnesses told the defense attorney anything different? Ask for any notes containing summaries of additional or inconsistent statements.

Could the plaintiffs' attorney get the information in question if one of the crew members had died since the attorney interview?

Would Hickman apply if the attorney had obtained written statements from the crew hours after the sinking?

Could the plaintiff ask (by interrogatory) if any company employee saw the captain drinking that day?

Would it apply if the attorney conducted the interview to prepare for the hearing of the Steamboat Commissioners?

Would it apply if or Rule 26 apply if, after an accident, one driver interviewed witnesses to the accident?

Upjohn

Could the IRS ask individual Upjohn employees what they said in he or she said in the questionnaire?

Could the IRS ask an employee if he or she had ever made any statement inconsistent with what he or she had told the IRS?

Would the result in this case be different if the letter was written and signed by a non-lawyer in anticipation of litigation with the IRS?

Could the IRS use an interrogatory to ask Upjohn if anyone had been bribed? If so, could it also ask for the names of any Upjohn employees who had knowledge of the bribes?

Under Upjohn, does the privilege apply to former employees?

In a civil suit, could the plaintiff's attorney interview employees of the defendant without notice to the defendant's attorney and out of that attorney's presence? Since the defendant in Hickman had an attorney, can the plaintiff's attorney interview company employees without notifying and getting consent from the company attorney?

In light of Upjohn, was there an attorney-client privilege in Hickman?

In general, does it matter if interviews were conducted by an attorney or by a paralegal?

In what ways is work product broader than attorney-client privilege?

In what ways is attorney-client privilege broader than work product?

(44) Methods of Discovery

Rules: 27-36

The Federal Rules of Civil Procedure provide a number of different discovery tools which a party can use to unearth needed evidence.

These include interrogatories, depositions (of parties and non-parties), requests for admissions, requests for the production of materials, subpoenas to depose or obtain materials from a non-party, and requests for examinations.

Your law firm has been retained to represent the plaintiffs in the case described below. Prepare a memo with a discovery plan, setting out (1) what you want to ask your clients before the discovery begins, (2) what investigation you want to do before discovery begins, (3) which forms of discovery you would use, (4) what you would ask (e.g. questions for a deposition) or ask for (e.g. a request to produce something for inspection), and (5) in what order you would conduct the discovery . You can only depose the defendant one time.

You can prepare this plan jointly with one or more other students if you wish.

Case Summary

"The plaintiffs in this case are Papa Bear, Mama Bear, and Baby Bear. They live in a cabin in the woods. Papa Bear's mattress is ultra firm. Mama Bear's bed is very very soft. Baby Bear's bed is in-between. (These facts may or may not be important).

One sunny day, Papa Bear prepared his favorite mocha-java porridge for the family. He put it on the table in three bowls, one for himself (very hot), one for Mama Bear (quite chilled), and one for Baby Bear (lukewarm). Then they all went out for a walk, which lasted longer than they had planned.

When the plaintiffs returned home, they found that the place had been badly trashed. Someone had taken a spoonful of Papa Bear's porridge and a spoonful of Mama Bear's porridge; Baby Bear's porridge had been completely eaten. The chairs of Papa and Mama Bear had evidently been used--they were out of place, and their pillows were all awry. Baby Bear's chair was badly broken, as if someone far too heavy for the chair had sat on it. Fearing the worst, they proceeded to the bedrooms. Sure enough, one or more persons (with his or her or their shoes on) had been in both the bed of Papa Bear and the bed of Mama Bear.

The covers were a mess, and there was dirt in both beds. Most shockingly, a stranger was actually sleeping in the bed of Baby Bear--the bears assert it was the defendant, Ms. Goldilocks.

The complaint alleged three distinct claims: (a) conversion (taking) of the porridge (all three plaintiffs raised this type of claim), (b) invasion of privacy for sleeping in their beds (again, all three plaintiffs asserted this type of claim), and (c) destruction of property--the chair (only Baby Bear raised this claim.) Baby Bear is old enough (in bear years) to sue on her own. Defendant Goldilocks filed an answer denying the allegations that she had done this; subsequently, however, she settled all of Baby Bear's claims.

Your clients have given you \$3000 for discovery costs. Anything above that the firm will have to advance. The firm will get the money back if you win. If you lose, technically the bears are supposed to reimburse you for costs over \$3,000, but, seriously, how much are they good for? Here is what things cost:

Deposition upon oral examination: \$1000-\$2000 (depending on length) plus 10 hours of lawyer time
Production of documents or things: \$500 and 2 hours
Expert examination of one piece of evidence: \$5000 and 4 hours
Interrogatories (you don't have to propound them all at once)(5): \$ 500 and 2 hours
Request for admissions (10): \$500 and 1 hour
Physical examination of person, with expert report: \$2000 and 5 hours
Interview of 10 cooperating witness: free and 2 hours per witness

Remember, all of these things take time of the attorneys from your office, for which you will not be paid unless you win. The cost of the associates your firm employs, with benefits, is about \$100 an hour; they bill at \$200 per hour. The partners get paid \$200 per hour and bill at \$400 per hour.

IV. Determining Factual Issues

(45) Summary judgment and Judgment Notwithstanding the Verdict (Judgment as a Matter of Law)

Rules 50 and 56

Introduction (CP 955-57), Celotex (CP 966-75), Adickes (CP 962-66), Cross v. US (CP 958-60), Scott v. Harris (CP 979-83), Reeves (CP 1066-75)

Reeves

In general the standard for granting summary judgment is the same as the standard that would be applied if a case were tried and the

verdict loser moved for judgment as a matter of law. Reeves is one of the Court's most recent accounts of the post-trial JML standard.

Suppose the estate of a creditor files suit asserting that the decedent was owed \$100 by the defendant. The defendant moves for summary judgment, submitting an affidavit asserting that he gave the decedent the money in cash at a meeting to which there were no witnesses. The plaintiff-estate has no contrary evidence. Should summary judgment be granted, but argues that if the defendant testifies in open court it will be obvious from his demeanor that he is a lying snake?

Celotex

In Celotex the company first moved for summary judgment on the ground that there was no evidence of any exposure to asbestos from a Celotex product. Catrett responded by putting in the record the material described in the book regarding exposure when her husband was working in Illinois. Celotex then withdrew the motion. Several months later the defendant filed a new motion, now asserting that the plaintiff (whose husband had died allegedly from exposure to asbestos) had no evidence the decedent had been exposed to Celotex asbestos in the District of Columbia, the district in which the suit was brought. (What type of objection was this?) The plaintiff agreed that was true, but argued it was legally irrelevant, because her husband had sickened and died in DC.

Counsel for Celotex did not file a reply brief. At the oral argument, counsel for Celotex argued that the materials regarding exposure was inadmissible. After oral argument, the district judge ruled from the bench, awarding summary judgment on the ground that there was no evidence of exposure "in D.C. or elsewhere."

Was it proper for the district judge to rule there was no evidence of exposure "elsewhere"? Would it have been proper for the court to decide Celotex's argument that the materials were inadmissible? Note that Judge Bork argued that Catrett had failed to explain what Hoffman would testify about, or to show that Hoffman had any personal knowledge about exposure.

Suppose you represent Dr. Doolittle in a medical malpractice claim regarding a surgery she performed. You know from discovery that the plaintiff, Mal Lingerer, has hired an expert (Professor Hi Poetical); you deposed the expert, and think you found some serious flaws in her analysis. Mal in her deposition said while coming out of surgery that he heard someone say "Boy, we messed up that one." You don't think that will hold up, since he cannot recall who said it or in what context. You are going to file a motion for summary judgment for Dr. Doolittle. You have affidavits from the Doctor and everyone at the surgery stating that everything was done perfectly, and you will file those with your motion. In your motion and opening brief, do you want to describe Mal's evidence and explain why you

think it is defective, or would you ignore it in the opening briefing and just deal with that evidence (if and when Mal's lawyer puts it in the record with her brief in opposition) in your reply brief?

Adickes

In the district court, prior to the filing of the summary judgment motion, the district judge had ruled that Kress could only be liable if there was a conspiracy between the police officer and the store manager. Kress submitted an affidavit from the manager stating that he had never seen or communicated with the police officer. The district judge granted summary judgment, but the Supreme Court reversed. Why did the Supreme Court reverse? Why didn't either party in Adickes introduce an affidavit about whether a cop was in the store?

Cross v. US

The US did not offer any evidence at all in opposition to the motion for summary judgment, and yet the motion was denied. Does that make any sense?

Suppose a suit is brought on behalf of the widow of an unarmed man shot and killed by police. The only witnesses to the shooting are the police officers, who sign affidavits stating that the victim, disregarding orders to raise his hands, reached for his waistband.

It was dark, and fearing the victim was about to draw a gun and fire, they shot him instead. Since the plaintiff has no witness to deny that account of the events, must summary judgment be granted? Would it matter who has the burden of proof as to whether the use of force was or was not justified?

Scott v. Harris

The key question in this case was whether Harris's flight posed "a substantial and immediate risk of serious physical injury to others."

The majority concluded that any reasonable jury would conclude that it did. The relevant facts were mostly not disputed—Harris was driving at up to 85 mph on a two lane unlit country road, went through two red lights, drove part of the time in the middle no-left-turn lane and crossed the yellow double line. He passed (perhaps "swerved" around) several cars; cars going towards him had pulled over by the time he got to them. There were no pedestrians on the road.

A large group of individuals viewed the tape after the decision. A substantial majority agreed that Harris posed such a risk, but a significant minority (and almost half of the blacks in the survey) disagreed.

Should this issue have gone to a jury?